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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO 05 JUL 22 PM 12:13

WESTERN DIVISION

Richard J. Klein III, pro se,  
R.C.I. P.O. Box 7010  
Chillicothe, Ohio 45601  
Petitioner/Appellant,

vs.

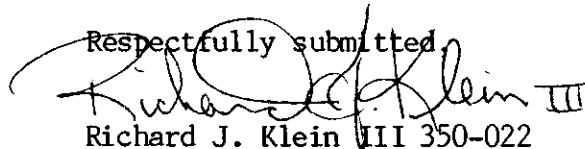
CASE NO. 1:01-cv-794

Harold Carter, Warden  
Ohio Attorney General  
150 East Gay Street  
Columbus, Ohio 43215,  
Repondant/Appellee.

**MOTION FOR CERTIFICATE OF APPEALABILITY**

Petitioner/Appellant Richard J. Klein III, pro se, respectfully requests issuance of a certificate of appealability from the judgment of the United States District Court Southern District of Ohio entered in this action on the 27th day of June, 2005, (Doc. 82-83) dismissing with prejudice Petitioner/Appellant's habeas corpus application on procedural grounds. Petitioner/Appellant requests to appeal on the grounds set forth herein.

Respectfully submitted,



Richard J. Klein III 350-022

PETITIONER/APPELLANT, PRO SE

R.C.I P.O. Box 7010

Chillicothe, Ohio 45601

STATEMENT OF FACTS

(Transcript of Proceedings, hereinafter cited as (T.P. page No., Lines)).

The facts proven beyond a reasonable doubt are, on January 2, 1997, Sharon Richmond (Richmond) mother of deceased and co-defendant continually, repeatedly and "voluntarily" confessed to being solely and independently responsible for causing the injury that caused the death of her son during Richard Klein's (Appellant's) absence from the residence, (T.P. 42) three of which were tape recorded. (as fully set forth below). Therefore, Appellant could not have caused the injury or the death. Richmond's confessions possessed an extremely high probative force for several reasons, first, because Richmond knowingly, intelligently, and voluntarily waived her Miranda rights on three (3) different occasions. (See Doc. 53, [Appendix of exhibits] Petitioner's Exhibit- "G" Richmond's three (3) Miranda waivers; (hereinafter P.Exhibit G)) (See also T.P. 410, 6-10; 486, 8-25) which render her confessions valid, trustworthy, and reliable. The jury was not provided the evidence or information to render a fully informed determination of the validity, trustworthiness, and reliability of Richmond's confessions because the proof that she did so knowingly, intelligently, and voluntarily is the determinative factor in rendering the determination. All the jury heard was vaguely that she waived them. The difference is in the probative force of a written and signed waiver that is knowingly, intelligently, and voluntarily submitted, and three of them is overwhelmingly powerful evidence.

Prior to police interrogation that rendered Richmond's numerous confessions, Richmond voluntarily provided numerous admissions to other officials, first, on the 911 emergency call (T.P. 403, 13-15; 503, 12-17) then to the Captain of the Fire and Rescue Department upon arrival to the residence to transport her son (T.P. 439) then to a doctor, Chaplain, and Child Services

Investigator upon arrival at the hospital. (T.P. 408; 503, 12-17). Richmond's confessions were identical to these admissions, consistent with the nature of the injury "immersion," and she voluntarily provided multi-layered confessions; first, beginning upon detectives arrival at Shriner's Burn Institute where Richmond waived her Miranda rights the first time and voluntarily provided a tape recorded confession at approximately 3:30 pm January 2, 1997. (T.P. 23, 15-22; 409-410; 463; 490-491; 513, 16-25)(See also Doc. 53, P.Exhibit G, first waiver "1447 hours"). Richmond was then taken to police headquarters (CIS) where she maintained independent responsibility (T.P. 512, 7-10; 467; 468) where Appellant was left in a public lobby because he was not a suspect and not ordered to stay nor involved in any way. (T.P. 42; 481, 19-25)(not suspect T.P. 42, 1-3; 463, 17-25; 464, 1-16; 481, 19-25). Then detectives took Richmond to the residence where she waived her Miranda rights a second time and she demonstrated how she gave the bath that cause the injury. (See P.Exhibit G, 2d waiver form; T.P. 468, 6-10; 485, 1-9; 487, 1-11; 490, 12-16; 515, 6-8; 519, 21-25; 520, 23-24; 521, 523, 3-25). Then Richmond was taken back to CIS where she waived her Miranda rights a third time and maintained sole and independent responsibility, (See P.Exhibit G, 3d waiver form; T.P. 469, 6-13; 486, 8-25; 487, 3-11; 495, 11-13), most importantly, Richmond did so knowingly, intelligently, and voluntarily, and without the grant of immunity which is a strong indicator of reliability as the Court held in *Carriger v. Stewart*, 132 F.3d 463, 475-76 (9th Cir. 1997). The issue here is not Richmond's credibility because regardless of her credibility it does not diminish the fact that she gave valid, trustworthy, and reliable confessions consistent with the injury and other facts which is powerful evidence of Richmond's guilt and Appellant's innocence. Detectives knew, therefore the State knew, and proved that Richmond's confessions were

consistent with the nature of the injury because they knew from doctors it was an "immersion burn," (T.P. 543; 544; 545) and police knew and testified that Richmond confessed that she found him in "a pool of water" (T.P. 487, 7-9) with an "expressionless face," (T.P. 513, 16-25; 523, 10-11) which was consistent with the nature of the injury "immersion," and consistent with her son's seizure disorder described as a "blank stair." (T.P. 347, 19-25; 348, 19-25; 304-307). Detectives testified therefore the State was fully aware of the seizure disorder, (T.P. 540, 6-18) and that Richmond's confessions were consistent with the facts of the injury which are admissions by the State and highly probative evidence. Therefore, they knew and admitted the injury could have happened the way Richmond confessed or some way close to this because detectives testified that they knew Richmond's fabrications diverting blame to Appellant were lies. (T.P. 543; 544; 545).

Then at 9:30pm on January 2, 1997, during detective's seven (7) hour long interrogation that mentally wore Richmond out (T.P. 469, 17-18) forcing Richmond against her will to suddenly divert blame, and after having a private conversation with one of the detectives (T.P. 470, 14-25) where she found out that she was going to be charged with numerous crimes, Richmond suddenly fabricated a story diverting full blame to Appellant that did not possess any evidentiary support or corroborating evidence whatsoever supporting that her multi-layered confessions were lies. (T.P. 426, 11-25; 543, 8-25). The State presented absolutely no evidence whatsoever proving that her confessions were lies, nor in support her new fabrications about Appellant punishing her son with cold baths then punishing her son with a hot bath that allegedly caused the injury, and, most importantly, the State admitted through its police (prosecutorial machinery) that they knew Richmond's fabrications suddenly diverting blame implicating Appellant were all lies (T.P. 543; 544; 545)

which they supported with expert witness evidence as the basis of this admission. Therefore, neither the jury, sentencing court, nor the appellate court could have relied upon any of Richmond's fabrications to support Appellant's multi-layered convictions and multi-layered sentences for what could only have been determined to be a single offense of placing Richmond's son in a bathtub of hot water [one time]. Nevertheless, the evidence possessing the highest probative value (Richmond's confessions) proving beyond a reasonable doubt were consistent with the nature of injury as the State admitted that it knew because it was consistent with expert witness testimony, and her confessions were valid, trustworthy, and reliable due to the voluntariness factor. Therefore, her confessions were the only thing that reached the requisite standard of proof beyond a reasonable doubt.

Then Richmond testified confessing again while viewing the photos of her son's injury to knowing the severity of the injury from the onset. (T.P. 375; 393; 394; 395; 429; 430; 523, 16-17). Thus, confession in open court that she was fully aware of the severity, and the State cannot argue, as it has, that Richmond suddenly found out how severe her son's injury was causing her to divert blame (T.P. 525) which demonstrates the detective's willingness to falsify information to the jury.

Then after submitting multi-layered confessions, and after confessing that Appellant was not even there at the time the injury occurred and when she called 911 emergency, (T.P. 42; 409) Richmond, when questioned by detectives on tape whether or not anybody prevented her from calling 911 or for other help responded, "I am an independent person, I have a brain, and I can make these decisions on my own," (T.P. 409; 424; 425; 427; 491; 549) thus, Richmond confessed in open court at appellant's trial to being solely responsible and confessed again when she entered her guilty plea prior to the trial (T.P. 15;

16) proving beyond a reasonable doubt that she was solely responsible for the decision not to obtain medical treatment for her son. Additionally, Richmond was her son's sole legal guardian and had been a mother with (12) years experience. (T.P. 345). Appellant was neither a father, nor serving in the capacity of father for Richmond's son. (T.P. 345; 370, 6-12). Richmond's fiancée "Ron Evans was the only individual who ever served in the capacity of father. (T.P. 346). Appellant had only known Richmond for a month, (T.P. 417, 22-25) and Appellant was not there at the time the injury occurred; (T.P. 42) therefore, Appellant was not aware of the severity of the injury even though he came home later that evening on January 1, 1997, when the injury occurred. (T.P. 484, 19-20). The State failed to prove with any evidence whatsoever that Appellant was there when the injury occurred, and the State failed to prove that Richmond showed Appellant the injury or made him aware of the severity, and as demonstrated above, Richmond possessed full control and was the only authority over when she obtained medical treatment for her son. Therefore, it is indisputable that she is responsible for the resulting death from the damage caused by the delay which is what her son died of as expert witness testimony proved beyond a reasonable doubt. Most importantly, Appellant possessed no parental authority, or power, or authority and control over Richmond or her two member family. Richmond is the responsible party that possessed the only legal obligation, power, and authority in the equation. Therefore, the State knowingly pursued and obtained a conviction on one they knew was innocent.

Expert witness testimony fully established that Richmond's son died of damage to the lungs caused by Richmond's (12) hour delay in seeking medical treatment for her son. As stated above, Richmond was an "independent person," she "has a brain," and she "can make these decisions on her own." and, as the

Doctor testified this delay is what he died of "in actuality," (T.P. 578, 21-23) and, that, they could have controlled and reduced the damage. (T.P. 578, 5-7). The Doctor testified that there was a high probability of (65) percent of her son living had she obtained immediate medical treatment (T.P. 575, 12-25) instead of controlling the outcome because it was a (74) percent burn, (T.P. 706, 10-11), but, that plummeted to ten (10) percent due to her (12) hour delay (T.P. 579, 15-17) which is nearly non-existent. Therefore, since Richmond knew the severity of her sons injury from the onset, and because her son died of the damage resulting from the her delay, and Richmond confessed to being solely responsible for causing the injury and for independently causing the delay then the State proved Appellant's innocence by proving that Richmond was solely and independently responsible and in full control and legal authority over everything that occurred. The State failed to present any evidence of Appellant's involvement other than Richmond's fabrications diverting blame which the State admitted to knowing were lies and relying upon and proving they were lies with highly probative expert witness evidence and with highly valid, trustworthy, and reliable confession evidence. Richmond's fabrications were calculate for the sole purpose of diverting blame to Appellant to evade further indictment and to curry favor with the State to obtain a minimal, nominal, or favorable sentence for the single count indictment that Richmond plead guilty to. Of equal importance, is that Richmond's sentencing hearing was strategically scheduled and rescheduled for after Appellant's trial to manipulate and control Richmond's trial testimony and it had that effect; therefore, the jury could not have accurately factored Richmond's sentence into their determination, nor was the jury aware that she was only charged with a single count indictment. The jury did not factor into its determination that Richmond had a plea bargain arrangement where she was

granted partial immunity and promised leniency at her upcoming sentencing hearing. (as fully set forth in Habeas Petition). Since the State withheld this evidence this conviction should be overturned.

The State falsely presented an alleged apology note through Richmond's testimony. Knowing that it was false testimony and failed to disclose the evidence proving beyond a reasonable doubt that her testimony concerning the note was a fabrication. First, Richmond mis-read the note. (T.P. 400; 401 compare to P.Exhibit I). Therefore, the State permitted Richmond to fabricate testimony concerning the note. (See P. Exhibit I, page 5). And, failed to correct what it knew was false testimony in violation of Due Process of Law. Second, trial counsel placed on record that the State withheld this note. (T.P. 402). By withholding the note it prevented investigation and discovery of the search warrants, and, most importantly, denied meaningful cross-examination at trial to prove the origin of the note and to prove Richmond's testimony to be another fabrication. Counsel was unable to connect the search warrants to the testimony concerning the note. Third, the State withheld the search warrants which is the evidence proving where the note came from which demonstrates both that Richmond's story about the note was another fabrication, and that the State knew that it was a lie because it possessed the search warrants; therefore, it knew or should have known. The the search warrants demonstrate, that, (1) the note was not found in the mailbox as Richmond testified, (2) the note was found by Detectives in the kitchen trash after the fact and was placed there prior to the injury. The record demonstrates that Appellant was in the county jail when it was discovered by detectives and Appellant could not have placed it in the trash after the injury because Appellant was never in the apartment after the injury occurred which is evidenced by the record. (as fully set forth in the Habeas Petition).



(3) The evidence (search warrants) demonstrates that the note Richmond testified to is the exact same note that was discovered by detectives, rather than Richmond, during their execution of the search warrants which is the evidence that it was the note in the white envelope that was read to the jury. Therefore, Richmond did not find the note in the mailbox and deliver it to detectives, and the entire testimony revolving around the note is simply one of Richmond's fabrications. The State failed to connect the note to the injury in any significant way because the note does not make any reference to this injury and Richmond's testimony does not qualify and evidence connecting it in any way. Therefore, admission of it is in violation of Due Process of Law because it was non-disclosed, unconnected to the incident, and revolved around Richmond's fabrications therefore, it was a lie, and the State failed to disclose the search warrants and the actual note denying effective cross-examination at trial. The State's police departments search warrants are highly probative evidence, especially, here due to the fact that the search warrants identify the note specifically as being the one in the white envelope.

Then the State unlawfully and falsely testified that Appellant gave an admission in a (30) minute interrogation, (T.P. 30, 19-25) but this information is false because the State admitted into evidence that Appellant unwaiveringly invoked his Miranda rights by refusing to voluntarily give detectives any statement other than refusals to voluntarily provide verbal and tape recorded statements, (T.P. 62, 1-3; 497, 20-25) refusals to voluntarily give written statements, (T.P. 61, 24-25) and refusals to voluntarily sign detective's notes; (T.P. 498, 3-10; 40, 13-19) therefore, Appellant did not adopt whatever was written on the paper as being his own statement. These refusals work the same as Combs' "talk to my lawyer" statement in Combs v.

Coyle, 205 F.3d 269, 286 (6th Cir. 2000). First, because they mean the same thing; second, because Appellant's refusals possess the same probative force of invoking Miranda rights in the absence of an attorney. Since, these refusals had to have occurred prior to detective's alleged interrogation began because that would have been the only time that detectives asked the question whether Appellant would provide verbal, tape recorded, or written statements, and Appellant refused to sign the notes at the end of the interrogation is proof that Appellant unwaiveringly invoked his rights designated by Miranda v. Arizona because it lasted throughout the entire interrogation. Therefore, this proves when Appellant invoked his Miranda rights was, in fact, prior to detective's interrogation and interrogation did not stop as it should have. Therefore, in the absence of any evidence whatsoever of what actually transpired that evening because the detectives conveniently failed to tape record anything (T.P. 29; 497) after Richmond provided numerous tape recorded confessions. The State failed to prove any such statement was made and the only evidence that exists with any probative value was that Appellant invoked his Miranda rights prior to interrogation.

Second, the State entered into evidence through its police that the alleged inculpatory statement was also a lie because they knew it could not have happened that way. (T.P. 481, 1-4; 504, 15-25; 505). Therefore, it is not evidence possessing any probative value and does not reach the proof beyond a reasonable doubt standard. Therefore, the jury could not have relied upon what it knew was a lie because it was proven to be a lie with the highest ranking and the most highly probative evidence that can be presented to a court, the State's own admission through its "prosecutorial machinery" (the detectives testimony). Since, the State's admission qualifies as a statement against interests it possesses an even greater probative value. If the jury relied on,

or Appellant's alleged admission could have affected the judgment of the jury in any way the conviction must be reversed because it is an automatic violation of the Due Process Clause of the United States Constitution for the State to present what it knew was a lie to achieve a conviction upon. It is indisputable that it was a lie and equally indisputable that the State knew it because its police testified that it was a lie. The mere fact that Appellant was allegedly not providing truthful statements demonstrates again that police were trying to overbear Appellant will after Appellant was invoking his Miranda rights. If Appellant was "voluntarily" providing statements then there would have been no prohibition about providing factually accurate tape recorded statements. The State's reliance upon what it knew was a false statement is in violation of Due Process.

Third, Appellant invoked his rights unwaiveringly at trial by not taking the witness stand. Therefore, the alleged admission was inadmissible because Appellant did not leave the door open for introduction of that evidence at trial. Its admission into evidence was in violation of Due Process of Law.

GROUND FOR ISSUING COA

(1) On November 16, 2001, Petitioner/Appellant filed habeas corpus petition. On June 27, 2005, the United States District Court Southern District of Ohio issued an order adopting the Magistrate Judge's report and recommendation erroneously dismissing the habeas corpus petition with prejudice (Doc. 82) on the grounds that (1) "...dismissal on procedural grounds of all claims for relief with the exceptions of grounds two, three, and fifteen," and "A certificate of appealability shall not issue with respect to the dismissal on procedural grounds of all claims for relief..."; (2) The Court also erroneously denied certificate of appealability with respect to grounds two, three, and fifteen based on Petitioner/Appellant "has failed to make a substantial showing of the denial of a constitutional right remediable in this federal habeas corpus proceeding," and because "Petitioner has not demonstrated that reasonable jurists could debate whether these claims should have been resolved in a different manner or that issues presented were 'adequate to deserve encouragement to proceed further.' " (Doc. 82, at 2). The Court's determination provides the inference that in the remaining grounds, Appellant has made the requisite showings of denial of constitutional rights remediable in federal habeas corpus proceedings but dismissed on procedural grounds. The dismissal on procedural grounds was in error for the reasons set forth herein.

"In order for this court to grant a certificate of appealability, defendant must make a 'substantial showing of the denial of a constitutional right'. 28 U.S.C. 2253(c)(2). In addressing the requirements of obtaining a certificate of appealability under 2253(c), the Supreme Court recently stated that a defendant must show a substantial denial of a constitutional right by demonstrating 'reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 1603-04 (2000)." U.S. v. Espinoza-Seanz, 235 F.3d 501, 502 (10 Cir. 2000).

"[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 1604 (2000). Therefore, the determination of whether a certificate of appealability should issue in this case must have 'two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding.' *id.* Because the district court did not reach the merits of ... petition, and our certificate of appealability is confined to the procedural issue of timeliness, we must examine [the] underlying constitutional claims." *Adams v. LeMaster*, 223 F.3d 1177, 1179 (10th Cir. 2000).

"Petitioner need not demonstrate, however, that he would ultimately prevail on the merits. *Drew v. Collins*, 5 F.3d 93-95 (5th Cir.)." *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997).

(2) First, Appellant's fourteenth and fifteenth grounds for relief were withdrawn by motion by Appellant at an earlier date in (Doc. 67) which was granted by the Court; (Doc. 69) therefore, they were not part of this litigation which leaves grounds one through thirteen. Appellant moves to appeal on these remaining grounds with the additional procedural issues that caused the dismissal of all of the claims with prejudice. These procedural issues are based upon proceedings and State court decisions that the result of which were rendered "fundamentally unfair" by violations of the constitution and laws of the United States; therefore, Appellant is Constitutionally entitled to the requested relief.

"Federal habeas relief is available to petitioners in state confinement as a result of a proceeding that was rendered fundamentally unfair by violation of the Constitution, laws, or treaties of the United States. See *Norris*, 146 F.3d at 323 (citing *Etelles v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475 (1991))." *Combs v. Coyle*, 205 F.3d 269, 291 (6th Cir. 2000).

"...review of district court's dismissal of a habeas petition as abusive..." ... "The district court abuses its discretion if the court's decision is based on 'an erroneous finding of fact.' " *Paradise v. Arave*, 130 F.3d 385, 390 (9th Cir. 1997).

"The State Court's findings of fact are presumed to be correct and may only be contravened by clear and convincing evidence. 28 U.S.C. 2254(e)(1)." Monzo v. Edwards, 281 F.3d 568 (6th Cir. 2002).

"We review the district court's conclusions concerning a habeas petition de novo and its factual findings for clear error. See Lucas v. O'Dea, 179 F.3d 412, 416 (6th Cir. 1999)." Monzo, at 575.

### **I. FAILURE TO EXHAUST STATE REMEDIES**

One of the main issues was and the District Court erroneously held that Appellant failed to exhaust a remedy of delayed appeal to the Ohio Supreme Court in which Appellant demonstrated that he has, in fact, pursued the requisite delayed appeal to the Supreme Court. The dismissal on the grounds of failure to exhaust remedies should have been a dismissal "without prejudice" until the filing of a renewed petition which would have been the more appropriate determination as fully set forth in Appellant's. (TR Doc. 70, at 17-18 (¶15); 20-21 (¶16); Objection to M.J. RR Doc. 81, 15-18(¶11, ¶12; ¶13, ¶14). The Court's findings of fact and law were erroneous because they were contrary to the facts and contrary to and unreasonable application of clearly established law. Appellant requests to appeal on these grounds.

### **II. SECOND AND THIRD GROUNDS FOR RELIEF**

(3) The Court's holding that grounds two and three are not remediable on habeas corpus is in error because the ruling was contrary to the facts and contrary to Federal Constitutional Law in violation of Appellant's Due Process rights. The State Court's determinations on the same were also in violation of, contrary to, and unreasonable application of clearly established Constitutional rights rendering the proceedings "fundamentally unfair."

"When 'a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.' Coleman v. Thompson, 501 U.S. 722, 11 S.Ct. 2546 (1991); Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986)..." Monzo, at 575.

FAILURE TO PROVIDE NOTICE OF FINAL JUDGMENT

First, Appellant requests to appeal this issue on ground two because failure to provide notice of a final order to the "interested party" is a Federal Due Process of Law violation as established by the United States Supreme Court as the District Courts held in Woodard v. Williams, 236 F.3d 1135 (10th Cir. 2001); Day v. Sullivan, 794 F.Supp at 821-22 (S.D. Ohio 1991); and Matter of Park nursing v. Samules, 766 F.2d 261 (6th Cir. 1985) which provides sufficient cause for procedural default and requires automatic reversal of defaulted judgment because failure of the State's officials to provide notice of judgment to the only interested party in the equation also qualifies as "some interference by public officials" and "some objective factor external to petitioner's control" which constitutes "cause" under Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986); and Coleman v. Thompson, 501 U.S. 722, 753, 111 S.Ct. 2546 (1991). More fully set forth in (Traverse/Response (TR))(TR Doc. 70, at 14-16) Habeas grounds two and three). Therefore, not only did the State deny clearly established Due Process of Law rights, but it also caused the procedural default by not providing the only "interested party" in the equation opportunity to pursue redress of constitutional violations because Appellant missed all of his filing deadlines. This affects the fact and duration of incarceration as the court in Kirby v. Dutton, 794 F.2d 245 (6th Cir. 1986) holds falls "squarely within [the] traditional scope of habeas corpus," id. at 246, because it caused Appellant "to be illegally detained longer than he would otherwise be detained" by denying opportunity for redress of Constitutional injuries from trial and on appeal which is a matter of Federal Constitutional Due Process of Law, thus, is remediable in habeas corpus proceedings because the habeas court can order the State to provide an adequate appellate review or review the

claims. Second, Appellant was entitled to have the State Court set aside judgment of default for this very reason because of its "equal obligation to enforce and protect Appellant's Federal rights"; thus, the District was obligated to enforce the requisite Federal Law since the State failed to do so pursuant to Williams, Day, and Samules which provides failure to receive notice of judgment provides cause for the State procedural default and requires "automatic reversal of a judgment in default." And, the proceedings were rendered "fundamentally unfair" by the constitutional violation, Matter of Park Nursing, at 262-263, therefore, is remediable in these proceedings.

Third, the State Court's failure to provide an indigent Appellant adequate mechanism/process for remedying errors by providing copies of documents necessary to the appeal is another Due Process violation because it prevented earlier, timely filing of the 26(B) application rendering the proceedings "fundamentally unfair" by the Constitutional violation. (more fully set forth in Habeas grounds two and three; TR Doc. 70, 12-16 (¶¶9)-(¶¶11); Objection to M.J. RR Doc. 81, 5-15 (¶¶3)-(¶¶9); Doc. 81, 21-22 (¶¶20)). "...any arbitrary denial of a state-created right for which there is no state remedy is also a violation of procedural due process." Norris v. Schotten, at 329. The State created Appeal Rule 26(B) to remedy the Constitutional violation of ineffective assistance of appellate counsel. But, when, as here, an Appellant is denied the process (as provided by Crim.R. 32(B); and Griffin v. Illinois, 351 U.S. 12, 79 S.Ct. 585 (1956)) by which to invoke that remedy, this constitutes a Due Process violation that falls "squarely within the the traditional scope of habeas review." What occurred is, very soon and diligently after learning that the appeal had been decided within (18) days after learning of the judgment entry, Appellant very quickly and diligently prepared and attempted to file an original of the 26(B) application with an



affidavit of indigence and letter requesting copies to be made but the clerk refused filing, and Appellant also demonstrated, at that time, that, the record already established Appellant to be proceeding under in forma pauper status. The clerks refusal to file the documents without additional copies caused the 26(B) application to be late. Then Appellant attempted to obtain the copies necessary for filing by filing a "Motion to Reduce Number of Copies" to the court filed shortly after the clerk refused filing, but it was arbitrarily denied. Appellant presented a copy of this motion and its judgment entry denying it to the Court of Appeals in Appellant's motion for leave showing good cause for late filing of the 26(B) application at the later date after Appellant saved the funds necessary to obtain the copies and postage necessary for filing. Indigency qualifies as an "objective factor external to petitioner's control," and the clerks refusal to file the application because there were not enough copies and the Court of Appeals' denial of an adequate "mechanism/process for remedying the errors" (Monzo at 329) qualify as "interference by government officials," and "some objective factor external to petitioner's control" because the Appellate Court and the clerks qualify as government officials impeding Appellant's ability to obtain redress. Therefore, appellant was "unavoidably prevented" from timely filing by "objective factors external to his control" and by "[s]ome interference by government officials," thus, Appellant has met the requirements of Murray v. Carrier, and Coleman v. Thompson establishing cause for the procedural default. Appellant demonstrated by more than "clear and convincing evidence" that he was indigent and could not afford the requisite copies and postage necessary for the filing of the 26(B) application. Appellant provided an affidavit of indigency to the clerk of court, a letter requesting the necessary copies to be made, and a copy of the state's docket sheet showing

that Appellant had already been determined to be proceeding in forma pauperis and this was evident from the record. The affidavit of indigency was verified and notarized by qualified prison (government) officials. Prison officials would not have allowed Appellant to falsify that document in their presence. The affidavit states specifically "sworn and subscribed in my presence" on a specific day, month, and year, and the Notary Public had easy instant access to Appellant's account and previous income information; therefore, the document and its contents sworn to are "indisputable" and meet and exceed the "clear and convincing evidence" standard that Appellant was indigent, thus, unavoidably prevented from obtaining the copies and postage necessary to obtain redress of Constitutional violations that occurred in the earlier proceedings. In Appellant's motion for leave pursuant to 26(B) showing good cause, Appellant provided a copy of the letter to the clerk requesting copies as an exhibit, a copy of the affidavit of indigency provided to the clerk with the letter as an exhibit, a copy of the return letter from the clerk refusing filing containing the reasons for the clerk's refusal to file as an exhibit which was impermissibly based upon Appellant's indigency, and a copy of the state docket sheet as an exhibit, the first line of which shows pauperis status. Appellant demonstrated for the District Court the enormous costs involved with supplying the transcripts, copies of other evidence, and extra copies for service on the prosecutor. (Objection Doc. 81, at 9(¶4); Doc 70, 15-16(¶11)). There is more to it than simply filing a ten page unsubstantiated accusation. Appellant had to have submitted everything, according to Rule in his possession, to adequately support his claims to fully exhaust remedies and obtain an adequate review because a vague ten page allegation with no supporting evidence would have been insufficient to demonstrate ineffective assistance of appellate counsel and prejudice. Costs of the documents required

by Rule 26(B) was the problem, as well as, the postage. Nevertheless, the affidavit, verified and signed by a government prison authority who is credible enough to possess the status of Notary Public, possesses the probative value exceeding the "clear and convincing evidence" standard. The information on the State's docket sheet showing Appellant's indigence (affidavit and docket sheet were provided at all stages as exhibits) also possesses that probative value and even more because it is the State's record. The clerk of courts, the Court of Appeals, the Ohio Supreme Court, and the District Court were all provided all of the above stated evidence in the exhibits to demonstrate cause for the procedural default. Clearly established Federal Law requires only that a petitioner/defendant provide [s]ome evidence, that, "[s]ome objective factor external to Appellant's control impeded his ability to comply with the state's procedural rule" to establish cause for a procedural default. This Appellant has done at all stages in all of the proceedings. Additionally, the State has never provided any evidence whatsoever to controvert the verity and probative value of the evidence provided by Appellant to show cause. Most importantly, the United States Supreme Court in *Evitts v. Lucey*, 469 U.S. 105 S.Ct. 830 (1985) pointed out that it held in *Griffin v. Illinois*, 351 U.S. 12, 79 S.Ct. 585 (1956), that, the State must provide "a transcript to indigent criminal appellants who could not afford to buy one if that was the only way to assure an 'adequate and effective' appeal." *Evitts*, at 393/834. Which applies with equal force to copies necessary to achieve filing of a 26(B) application which the court in *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000) established was an equal part of the "appeal as of right" protected by the same Due Process of Law principles, thus, to achieve a Constitutionally "adequate" and "effective" determination in the 26(B) proceeding stage of the "appeal as of right," the

State was Constitutionally obligated to provide the requisite mechanisms/ processes (copies) to be made to secure filing of the 26(B) application, at minimum, this should have occurred when Appellant brought it to the Court of Appeals' attention in Appellant's "Motion to Reduce Number of Copies" for the filing of the 26(B) application. The application was late because Appellant was not timely notified of the judgment entry; therefore, there was no way he could have known that the time was running and had run out which also serves as "some objective factor external to Appellant's control that impeded his ability to comply with the state rule" providing "cause." In addition, Rule 32(B) of the Ohio Rules of Criminal Procedure guarantee an indigent appellant, on his "appeal as of right," copies of documents necessary to the appeal, and the 26(B) proceedings qualify as part of that "appeal as of right" where Federally protected Due Process rights attach. Therefore, the State arbitrarily denied state-created rights and rights guaranteed by the United States Supreme Court by denying the mechanisms/processes by denying adequate timely notice of judgment and denying the copies necessary to the filing of a 26(B) application to an indigent Appellant, thus, denying Due Process of Law on that part of "the state created appeal as of right." *White v. Schotten*. Therefore, the District Court's and State's Court's determinations were contrary to the facts and contrary to and unreasonable application of clearly established law because both grounds two (2) and three (3) advance adequate Federal Due Process of Law claims exactly like the claims advanced in *Evitts*, *Griffin*, *Williams*, *Day*, *Matter of Park Nursing*, and *White v. Schotten*. Therefore, Appellant is entitled to habeas relief on these grounds because, "...habeas relief is available to petitioner's in state confinement as a result of proceedings that were rendered fundamentally unfair by violation of the Constitution or laws of the United States. *id. Paradise*, at 390.

Fourth, the Sixth Circuit held in *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000) that 26(B) proceedings were Federally protected by Federal Due Process of Law principles. Therefore, not only did Appellant possess the right to effective assistance of an attorney in 26(B) proceedings, but he first possesses, as White did, the Due Process right to have an attorney before he can possess the right to effective assistance of an attorney. Appellant, therefore, possessed the same Federally protected rights as White did to have an attorney timely draft and submit his constitutional claim in the 26(B) proceeding in his behalf which Appellant was arbitrarily denied. Appellant's 'Motion to Reduce Number of Copies' should have been sufficient to alert the court to appoint counsel or order the copies or to reduce the amount of copies necessary to make the filing because at that time the failure to properly notify the "interested party" of entry of judgment was sufficient to overcome the time laps. Nevertheless, it is clearly established, the United State Supreme Court holds, that, " '[I]t is settled that were the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.' " *Miranda v. Arizona*, 384 U.S. 436, 476, 86 S.Ct. 1602, 1629 (1966); therefore, since 26(B) proceedings are part of the "appeal as of right" the very same Due Process of Law principles apply. Appellant was unconstitutionally denied notice that he possessed the right to an attorney if he wanted one for the purpose and denied notice of the judgment entry. Therefore, Appellant's second and third ground for relief are, in all actuality, claims showing good cause and that the proceedings were rendered "fundamentally unfair by violation of the Constitution, laws or treaties of the United States," *Combs*, at 291, because Appellant was denied the Constitutional right to effective assistance of an attorney, and the Constitutional right to have copies made of the documents necessary for

specifically, (the 26(B) proceedings); (4) Appellant was entitled to replacement counsel during the initial part of the appeal. Therefore, Appellant should never have been "held to a stringent definition of 'cause.'" Strickland, at 599. (more fully set forth in TR Doc. 70, 10-15(118)-(1110)). This issue supports grounds one through thirteen, and Appellant is only required, as a pro se applicant, "to state facts that point to a real possibility of constitutional error." Franklin v. Rose, 765 F.2d 82, (6th Cir. 1985) citing United States Supreme Court holding in Hanes v. Kerner, 404 U.S. 519, 92 S.Ct. 594 (1972). Since, Appellant was entitled to but denied of the Constitutional guarantees stated above, Appellant should be entitled to the liberal construction rule, and procedural leniency. Here as in White v. Schotten, Appellant should be permitted review by the Federal Courts of those claims that should have been brought to the attention of the Ohio state courts by counsel throughout the course of state proceedings but were not. White, at 753. Contrary to the District Court's determination in (Doc. 82), all of Appellant's pro se claims set forth colorable Federal Due Process claims remediable in this action. The law says nothing about requiring an indigent pro se litigant to draft, litigate, and submit pro se litigation like an attorney especially during the stages where Appellant was entitled to appointment of and effective assistance of counsel but was being denied, the denial of which meets 28 U.S.C. 2253(2) requirements and provides "cause" for the procedural defaults. Appellant requests to appeal on these grounds because the Courts should have provided the requisite constitutional protections to Appellant's pro se averments which were sufficient to make the Courts aware that violations have occurred or were occurring. Appellant was entitled to but denied the Constitutional protections listed above and forced into proceeding pro se. Those Courts possessed an "equal obligation" to protect Appellant's

filing, and the Constitutional right to have been notified of entry of judgment since Appellant was the only "interested party" in the equation. Appellant could not have possibly known that the time was running and had expired for the filing of the 26(B) application and for appeal to the Ohio Supreme Court. This serves a cause for the procedural defaults. Here, as in White, an attorney would have made all of the difference in the world as to the timing, drafting, and filing. Had Appellant received the requisite mechanisms/processes the outcome would have been different. At minimum, Appellant's claims would have received the review guaranteed by the United States Constitution, that, Appellant was denied the appellate review guaranteed on "a state created appeal as of right," *Evitts*, at 393/834, which is also in violation of Due Process of Law.

Fifth, Appellant requests to appeal on the ground that he was Constitutionally entitled to the replacement attorney requested formally before the Court of Appeals' review in those proceedings. (fully set forth in TR, at 2-9 (¶1)-(¶5); Habeas petition Doc. 53 at 1-7). Because, had Appellant received the "effective assistance of an attorney" in the direct appeal the outcome of the appeal would have been different, and there would have been no basis for or default of the 26(B) application. Had the court replaced counsel or ordered counsel to amend the deficiencies in his brief and ordered counsel to perfect Appellant's pro se claims there would be no procedural default.

In addition, Sixth, Appellant advances another Due Process Claim that he was entitled to procedural leniency, *Strickland v. Marshall*, 632 F.Supp 590, 599 (S.D. Ohio 1986), because he was entitled to the (1) assistance of an attorney; (2) to adequate notice of the Appellate Court's judgment so that he could invoke the jurisdiction of the Supreme Court and in a 26(B) application; (3) Appellant was entitled to copies of the documents necessary to the appeal,

rights at every stage which the courts failed to do, and which constitutes another Due Process of Law violation that Appellant requests to appeal on. Appellant requests to appeal on all the above stated grounds, as well as, the grounds advanced in the habeas petition.

Seventh, it was unconstitutional for the State Courts and the District Court to permit an attorney to control whether or not Appellant was permitted to invoke any further judicial proceedings, appeals, and all other remedies after the Court of Appeals entered judgment. An attorney should never possess that kind of power or authority over a defendant's case. The appellate attorney's failure to properly, adequately, and, most importantly "timely" inform Appellant that the Court of Appeals entered judgment in Appellant's case left Appellant without any further remedies in which Appellant possessed the Constitutional right to invoke. Counsel's "failure" precluded Appellant from invoking all proceedings thereafter including Federal Habeas relief through his failure to timely notify Appellant of the entry of judgment. Rule 22(B) of the Ohio Rules of Appellate procedure provides, "when a decision is announced, the clerk shall give notice thereof by mail to counsel of record in the case." App.R 22(B). This places the appellate attorney in an overwhelmingly powerful position to cut off any and all future remedies which is what occurred in this case causing the procedural default. This constitutes ineffective assistance of appellate counsel which provides cause for the procedural default because this is an objective factor external to Appellant's control. Therefore, Rule 22(B) is unconstitutional to the extent that it permits counsel of record predetermination of any and all other remedies that existed. A power to prevent all future litigation of a case by withholding timely notice of judgment to the only "interested party" in the equation, the appellant. This is not only an overwhelmingly unreasonable amount of power for



an attorney to possess over a case, but it is also "fundamentally unfair" in violation of Due Process of Law to permit an appellate attorney to control the outcome of all judicial remedies including Federal Habeas Corpus Actions. The United States Supreme Court holds that failure to provide the "interested party" notice of a final judgment is in violation of Due Process of Law requiring automatic reversal. (See citings page 4 herein; *Moldovan v. Cyahoga Welfair Dpt.*, 25 Ohio St.2d 293, 496 N.E.2d 466 (1986)). Counsel of record cannot be considered an "interested party" because an "interested party" possesses interest in redress in future proceedings after the proceeding previously decided. Once counsel files an appeal brief and appears for oral argument, his job is through; therefore, he cannot be construed as an interested party to justify serving notice of entry of judgment upon until and unless Appellant is served as "the interested party." Appellant provided the evidence as an exhibit in his "Motion for Leave to File Late 26(B)" application (see Doc. 53 Exhibit "F") proving beyond any doubt the date when the appellate attorney formally informed Appellant of the entry of judgment which was long after the filing deadlines expired. This evidence was counsel's certified time stamped envelope received by Appellant when counsel belatedly informed Appellant of the Court of Appeals' entry of judgment. This evidence possesses the same amount of probative value as the very same evidence that the State presented in one of Appellant's Ohio Supreme Court "appeals as of right" to get that appeal dismissed on procedural grounds. The State of Ohio (Appellee in that action) presented Appellant's time stamped envelope as evidence to prove when Appellee received Appellant's service of the Merit Brief. Since, this constitutes evidence of that magnitude where it can get an "appeal as of right" dismissed in the Ohio Supreme Court, then it also works as evidence rising to the requisite standards for Appellant to show "cause"

for a procedural default. Appellant provided the State's document relying on this very same evidence in Appellant's (Doc. 53 Appendix of Exhibits, as exhibit "P"'s exhibit). Since, this evidence is sufficient for the State to prove when it receives a document being served on it, then Appellant's evidence of counsel's certified time stamped envelope possesses equal probative value proving when Appellant belatedly received notice of judgment from counsel. This is only "fundamentally fair" and equal distribution of law. Therefore, Appellant has proven that he did not receive timely notice of judgment in time to proceed on appeal to the Ohio Supreme Court, nor in time to invoke 26(B) proceedings. The State argues that Appellant "cannot demonstrate cause" for the procedural default, but there is no proof of this because Appellant completely complied with the "cause" and "prejudice" doctrine in its entirety and with sufficient evidence demonstrating "cause" and 'prejudice.' Therefore, Appellant is entitled to judgment in his favor since he proved that an "objective factor external to his control impeded his ability to comply with the State procedural rule" because he "was unavoidably prevented from earlier filings." Appellant supplied the Court of Appeals and District Court with the above stated evidence in (Doc. 53, Exhibit "F" Motion for Leave to File Late 26(B) Application).

Eighth, Appellant was completely denied an attorney on an "appeal as of right" (26(B) proceedings) to conduct a reasonable investigation to discover the prison records of incoming legal correspondence which prove that Appellant received nothing from counsel after the Court of Appeals' entry of judgment until the time limits had expired. Therefore, Appellant's claim is objectively verifiable and constitutes "an objective factor external to Appellant's control" which meets the "cause" requirement. Appellant could neither afford an attorney, nor could he obtain the prison's records on his own. But, had

Appellant been provided the requisite attorney for the 26(B) proceedings, those records would have been obtained. Therefore, Appellant suffered prejudicial effect by being precluded from invoking all judicial remedies and from obtaining evidence.

### III. PROCEDURAL BAR OF ALL OF THE CLAIMS

(4) First, Appellant made a substantial showing of ineffective assistance of appellate counsel in ground four of the habeas petition which should have overcome the procedural default. It was based on the clearly established fact that counsel failed to raise any arguable issues because they were not supported by the record in any way and had absolutely nothing to do with "prejudicial" trial errors. "Prejudicial" being the key basis of one of Appellant's complaints against that attorney's performance. Counsel failed to raise any of the more powerful claims and evidence that stood a high probability of prevailing, but instead, only raised very weak, no-merit, non-supportable claims. Appellant supplied tons of evidence in support of his claim of counsel's deficiencies. In other words, counsel failed to advance [any] claim that stood a chance of prevailing that was supported by any evidence in the record, thus, violating Appellant's Sixth and Fourteenth Amendment rights. The State, Magistrate Judge, and the District Court failed to state which claim that counsel raised that had arguable merit that it would have reversed on; therefore, there were no claims advance by counsel that were arguable that protected Appellant's Constitutional rights. Counsel, as well as, the courts possess equal duties and obligations to protect Appellant's Constitutional rights. This did not occur at any stage. Thus, violating enumerated Constitutional rights again and again continually and repeatedly. This has been Appellant's complaints about counsel's performance from the onset. And, here is an example of how the courts and counsel continually and

repeatedly violated Appellant's constitutional rights was when the Magistrate Judge quoted the State court's erroneous finding,

"...Klein had disciplined Matthew for incidents of incontinence by immersing the child in a tub of cold water," (Doc. 80, at 3), and "Matthew suffered another incident, and Klein took him into the bathroom while Richmond remained in another room. Approximately twenty-five minutes later, Klein emerged from the bathroom and reported to Richmond that Matthew had been accidentally burned." (Doc. 80, at 3).

The courts' findings are evasive of the truth and contrary to and unreasonable determination of the evidence, without any record support whatsoever; therefore, no court or jury could have found this because it was never proven anywhere in the record, and there is absolutely no evidence whatsoever anywhere to support these fabrications because the State of Ohio vacated its position that Appellant caused the injury and death when it testified before the court that it knew these fabrications from Richmond diverting blame to Appellant were blatant lies, thus, testifying that Appellant did not commit the crimes, nor did any of the other events occur as Richmond's entire testimony were lies and fabrications aimed at her goal of diverting blame from herself after confessing to being solely and independently responsible for causing the injury that caused the death of her child. Since, the State of Ohio itself admitted and testified that Richmond's fabrications that Appellant had disciplined her child with cold water, then disciplined her child with hot water causing the injury are all lies, then the State of Ohio proved Richmond's fabrications were lies and there is no evidence to support the above stated quotations. The State's own testimony supported by its evidence that it claims supports its admissions to Appellant's innocence proves beyond a reasonable doubt that Richmond caused her child's injury and death. And, the State's testimony to these facts and the evidence it relied upon to render this determination are the highest

ranking evidence that can be presented to a Court of Law because admissions by the State carry the highest probative value especially when, as here, the State supports its admissions with highly probative expert witness evidence in support of its admissions. Therefore, no court or jury could ever rely upon what it knows to be "lies" and "fabrications" to support a conviction because that is a "blatant violation of Due Process of Law" by taking two dramatically opposed positions in one litigation as established by the United States Supreme Court, *Jacobs v. Scott*, 513 U.S. 1067, 115 S.Ct. 711, 712 (1995), and by relying upon what it knew were lies and fabrications. *Gigilo v. United States*, 405 U.S. 150, 153-54, 92 S.Ct. 763, 766 (1972)(quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935)). (see statement of facts for transcript citings and other evidence in support). Therefore, Appellant has met the 28 U.S.C. 2253(c)(2) requirement of "a substantial showing of the denial of a constitutional right," and "jurors of reason would find it debatable whether the District Court was correct in its procedural ruling." Because, the denial on procedural grounds revolves upon whether Appellant shows ineffective assistance of counsel which is "cause", with the other "cause" and "prejudice" demonstrated earlier herein for the 26(B) procedural default in which the evidence set forth in this motion meets and exceeds. Had Appellant received the requisite investigations and representation by both trial and appellate counsels, the results of both of the proceedings would have been different because Appellant, on his own investigation into the available records found overwhelming, substantial, credible, and highly probative evidence of actual innocence existed but was locked up by the State. (fully set forth later herein supporting actual innocence claim). This is based on the fundamental concept that Appellant should only have been punished based upon conduct proven beyond a reasonable doubt, and the above stated

quotes violate this principle. Appellant's above stated evidence meets and exceeds the "clear and convincing" standard which is all Appellant needed to show to gain the review and relief sought in the first place. Counsel failed to even touch lightly on any of the critical and more powerful claims contained in Appellant's record; therefore, rendering severally ineffective assistance of appellate counsel. In addition, the State of Ohio presented its admission that Appellant "was not even there when the injury occurred" therefore Appellant could not have caused the injury that caused the death of Richmond's child. The State of Ohio admitted that it possessed "valid," "trustworthy," and "reliable" evidence that Appellant was not there at the time the injury occurred; therefore, Appellant could not have committed the crimes charged. Counsel failed to touch even lightly on any of evidence possessing the highest probative value that can be presented to a court, the State's own admission supported by "expert witness" evidence. The issue of whether or not to review Appellant's pro se claims revolves around the ineffective assistance of appellate counsel claim. If counsel was "effectively" litigating Appellant's case the State failed to point to where and when. Respondent did not oppose Appellant's ineffective assistance of appellate counsel claim, there is no opposition to it. And, Respondent's procedural default defense to Appellant's ineffective assistance of appellate counsel claim should have been overruled because Appellant has already fully demonstrated "cause" with more than "clear and convincing evidence." Respondent failed to argue or prove that appellate counsel rendered constitutionally effective assistance. Therefore, Respondent agreed that Appellant advanced valid and supported ineffective counsel claims. The claim is fully set forth in Appellant's fourth ground for relief for the purpose of overcoming the procedural default. At minimum, this court can order the State

to provide the "adequate," "meaningful," and "effective" appeal because the State owes Appellant the Constitutionally "adequate" and "effective" appeal guarantees required by the United States Constitution. Although, the Constitution does not require a state to provide appeals of right, when it creates an appellate system, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts*, at 393/834. Therefore, since Appellant's Due Process rights were violated in so many ways throughout the course of trial and appellate review, and due to the fact that Appellant was denied representation, Appellant requests to appeal on these grounds because Respondent failed to oppose Appellant's ineffective assistance of counsel claim, and the District Court's determination was erroneous.

Second, The District Court's determination that all of Appellant's claims are procedurally barred is in error because it was contrary to the facts and contrary to clearly established Supreme Court precedent. The last State court, the Ohio Supreme Court could not have silently regarded a procedural bar because that issue was not properly placed before that court by the State for consideration. (fully set forth in TR Doc. 70, 17-20(¶15)). The State falsely and erroneously presented the claim to the Ohio Supreme Court that Appellant failed to timely file his Appeal Rule (5) application, but Appellant had never in the course of State litigation ever filed an App.R. (5) motion for delayed appeal because there was no reason to. That argument did not even apply to this case; therefore, the Supreme Court could not have considered an issue that was never placed before it, that, Appellant's 26(B) application was time barred. The issue was not adequate for the Supreme Court to have considered into its denial of appeal because it did not apply to any procedural circumstances existing in this case. Therefore, the Court of Appeals'

procedural ruling on the 26(B) application does not preclude Federal Habeas Corpus review because the last state court reviewing this case, the Ohio Supreme Court, could not have rested its decision on the Court of Appeals' procedural dismissal. Appellant requests appeal on this ground.

Third, the State failed to present to the Ohio Supreme Court a claim that the delayed appeal to the Ohio Supreme Court was time barred, and the Ohio Supreme Court Rules of Procedure Rule II, Section 2(4)(b) provides:

"(b) The provision for delayed appeal applies to appeals on the merits and does not apply to appeals involving postconviction relief, including appeals brought pursuant to State v. Murnahan, (1992), 63 Ohio St.3d 60, and App. R. 26(B). The Clerk shall refuse to file motions for delayed appeal involving postconviction relief. Oh. S.Ct. R. II, Section 2(4)(b).

Therefore, Appellant's appeal to the Ohio Supreme Court was, in fact, delayed appeal to that Court because the Clerk would not have allowed a delayed appeal to be filed from the 26(B) proceedings. Appellant was obviously seeking review of all of his claims in that "delayed appeal," and the State's Appeal Rule (5) argument did not reflect what was actually occurring was, in fact, "DELAYED APPEAL" to the Ohio Supreme Court. "IF" the State presented that as a defense then the Supreme Court could have dismissed on that averment, but no such challenge was presented or preserved on the record by the State. Therefore, the only thing that the Supreme Court could consider were the merits of all of Appellant's claims because a 26(B) default was not presented by the State. The State could not have prevailed on that averment because it was non-responsive to Appellant's case. Therefore, there is still no adequate opposition to Appellant's request for Habeas Corpus review by the Federal Courts. Appellant requests appeal on this ground.

Fourth, Appellant's appeal (Doc. 70, exhibit Q, at 2-3, attached therein) constituted delayed appeal to the Ohio Supreme Court under the particular circumstances that existed at that time as fully set forth in ("Petitioner's



Objection to Magistrate's Report and Recommendation" Doc. 81, at 15-20(¶¶11)). Therefore, the Ohio Supreme Court was considering the merits of all the claims and not whether or not this case was procedurally barred in the Court of appeals, nor was it considering the ineffective assistance of appellate counsel claim independently because all of Appellant's claims were drafted into the memorandum in support of jurisdiction, and Appellant specifically requested review of all of the claims independently in the beginning of that document. Appellant requests to appeal on these grounds.

Fifth, the issue as to whether or not Petitioner should pursue another delayed appeal to the Ohio Supreme Court is inconsistent with law because Appellant's first Supreme Court appeal constituted the delayed appeal, and Appellant was only required to invoke that Court's jurisdiction one time pursuant to *O'Sullivan v. Boerckle*.

"...we have never interpreted the exhaustion doctrine to require prisoner's to file repetitive petitions." *O'Sullivan v. Boreckel*, 526 U.S. 838, 844, 119 S.Ct. 1728, 1732 (1999).

"Nor, '...require a state prisoner to invoke any possible avenue of state court review, we have never interpreted the exhaustion requirement in such a restrictive fashion.' " *O'Sullivan*, at 844/1732.

"...a state prisoner need not have invoked every conceivably 'available' state remedy in order to avoid procedural default." *O'Sullivan*, at 855/1737.

"...state prisoners must give the state courts [one] full opportunity to resolve any constitutional issues by invoking [one] complete round of the State's established appellate review process." *O'Sullivan*, at 845/1732.

Since Appellant has invoked the Court of Appeals and then delayed appeal to the Ohio Supreme Court, and since the Supreme Court could not have considered any procedural default because that issue was not adequately placed before it, then Appellant is entitled the *O'Sullivan* definition (above) of what constitutes exhaustion "to avoid procedural default." *O'Sullivan*, at 844.1732. Nevertheless, Appellant was entitled to have the default judgment

from the 26(B) proceedings set aside for the reasons set forth in Day, Matter of Park Nursing, and Moldovan. And, when the (45) day time limit began running the state of the law, Sixth Circuit Rust v. Zent, established that appeal from the 26(B) application was the "delayed appeal to the Ohio Supreme Court," or Appellant would have filed at an earlier date if that was required to exhaust State remedies which was the basis of Appellant's decision not to pursue a delayed appeal to that court at an earlier time. Therefore, Appellant has, in fact, pursued the requisite delayed appeal, and Appellant could not have predicted a change in law. Nevertheless, Appellant was only required to invoke the jurisdiction of the Ohio Supreme Court [once] to exhaust remedies and avoid procedural default, and the Ohio Supreme Court was not considering Appellant's ineffective assistance of appellate counsel claim independently because that delayed appeal never would have made it past the Clerk and got filed. Therefore, Appellant requests to appeal on these grounds.

Sixth, Appellant's pro se claims were not given review by the Court of Appeals in the direct appeal due to arbitrary abuse of power. (See First Ground for Relief Doc. 53 habeas petition; Doc. 81, at 21-22 (¶20-21)). The Court of Appeals granted Appellant's motion for leave to amend and supplement counsel's deficient appeal brief. This was when full Due Process of Law principles attached to Appellant's pro se pleadings because the Court denied the requested replacement counsel for the purpose which forced Appellant to proceed pro se in violation of Due Process of Law. Then the Court unjustifiably struck the pro se brief without review on the merits and without any reason in violation of Due Process of Law. Therefore, Appellant's suffered prejudicial effect because Appellant's pro se claims were not reviewed on their merits nor were they ready for Supreme Court review when the (45) day time limit began running and ran out because of the State's failure to provide

notice of entry of judgment. Appellant has not raised any of counsel's claims in the habeas petition due to counsel's sever deficiencies in performance. Appellant suffered prejudicial effect because counsel left Appellant without any arguable claims on the "appeal as of right" or to advance to the Supreme Court at that time; therefore, Appellant had to proceed on the 26(B) application before presenting the claims to the Ohio Supreme Court. The Court of Appeals' failure to review Appellant's pro se claims, failure to appoint an attorney to cure the deficiencies in existing counsel's performance, and failure to provide the mechanism/process to cure the problem was in violation of "fundamental fairness" Due Process of Law and Appellant suffered prejudicial effect because counsel's assignments of error were inchoat and non-arguable, and Appellant's motion to amend counsel's deficient brief specifically requesting replacement counsel to cure the problems was itself sufficient to alert the court that a sever problem existed in this appeal and should have been dealt with accordingly. (as more fully set forth in TR Doc. 70, at 2-9). Appellant requests to appeal on these grounds.

Seventh, there is an absence of available state court remedies therefore Appellant is entitled to federal relief.

"An application for a writ of habeas corpus shall not be granted unless the petitioner has exhausted his state court remedies, there is an absence of available state corrective process, or circumstances exist that render such process ineffective to protect petitioner's rights." *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct. 1056 (1989).

"...the state appellate court was obligated to examine the claim on its merits, and that the state court's failure to do so did not undermine the exhausted nature of the claim." *Pillette v. Foltz*, 824 F.2d 494, 497 (6th Cir. 1987).

(see also Doc. 81, 8-9). There is an absence of state remedies available for when Appellant was not provided notice of entry of Court of Appeals' judgment in time to proceed to the Ohio Supreme Court and to invoke 26(B) proceedings to set aside judgment in default entered by the Court of Appeals

in Appellant's 26(B) proceedings, as well as, the default to the Ohio Supreme Court which requires the filing of delayed appeal to that court. Pursuant to Day v. Sullivan, 794 F.Supp 801 (S.D. Ohio 1991), and Moldovan v. Cuyahoga Welfair Dpt., 25 Ohio St.2d 293, 496 N.E.2d 466 (1986), and Matter of Park Nursing, 766 F.2d 261 (1985) automatic reversal was required, but there was an absence of state corrective process for Appellant to raise and correct the problem, and the processes available have been ineffective to protect Appellant's rights or there would be no procedural default issue at this time. And, as fully set forth above, there was an absence of state corrective process adequate to provide the requisite copies of documents necessary for the filing of the "appeal as of right" (26(B) proceedings) for indigent appellants, and for appointing counsel for those proceedings, or for providing adequate access to the court for those proceedings to achieve "adequate" and "meaningful" review. Therefore, the processes available were ineffective to protect Appellant's rights. The processes available were inadequate to remedy the problems and inadequate to provide adequate protection of Appellant's rights. Appellant should not be held procedural defaults created by unconstitutional conduct of the State's officials (clerk's refusal to file 26(B) application) and unconstitutional procedural decisions denying adequate corrective process (denial of copies; denial of counsel for the 26(B) proceedings; erroneous entry of default in 26(B) proceedings; failure to provide notice of Court of Appeal's entry of judgment) which rendered ineffective the processes available, and also constitutes enumerated Constitutional violations of Appellant's rights. The State Court's processes were ineffective in curing the following constitutional violations as well. The United States Supreme Court holds:

"...a defendant may not default a constitutional claim through

conduct that occurs as a result of the constitutional violation. Coleman v. Thompson,..." Morris v. California, 966 F.3d 488, 454 (9th Cir. 1991).

"Federal court will review claims, ...if no State court has provided a full and fair opportunity to litigate those claims." Wright v. West, 505 U.S. 277, 112 S.Ct. 2482, 2486 (1992).

"It is not necessary for any State court to have actually addressed the merits of the claims, so long as the claims have been presented to the highest court in the State." "We more hold, that a petitioner who is representing himself on appeal because he is no longer entitled to the assistance of counsel should not be held to a stringent definition of 'cause.'" Strickland v. Marshall, 632 F.Supp 590-598 (S.D. Ohio 1986).

Appellant's procedural "conduct" was caused by the procedural constitutional violations that caused the defaults. Appellant cannot be held to procedural defaults that occur as a result of the violations. The State Court failed "to provide full and fair opportunity to litigate those claims" by failure to provide notice of judgment; failure to provide requisite and requested attorney's; failure to cure the deficiencies in the appeal; failure to provide processes for a pro se litigant that requested aid to achieve an "adequate" and "meaningful" review. These Constitutional violations compounded and multiplied until Appellant did not receive any "appeal as of right" at all. In addition, the Court of Appeals was Constitutionally obligated to review Appellant's pro se claims in the early part of the appeal process because it obligated itself when it granted Appellant's motion to amend and supplement counsel's deficient appeal brief, especially, when it denied the replacement attorney specifically requested to cure the problems or failed to order existing counsel to cure them himself. This was when all Due Process of Law principles attached to Appellant's pro se litigation because Appellant was not requesting to proceed pro se, he requested an attorney in the beginning of the direct appeal in his Motion to Amend and Supplement Counsel's Deficient Brief. Appellant specifically requested an attorney to cure counsel's

deficiencies and perfect Appellant's pro se claims to "exhaust remedies on them" (See motion to amend) before the Court of Appeals' review of the case. The Court failed to provide the requisite attorney to cure the deficiencies in the appeal and failed to provide the requisite processes to achieve this. Providing the requisite mechanisms and process is not discretionary it was mandatory and guaranteed by the United States Constitution. Therefore, it obligated itself to review Appellant's claims on their merits but arbitrarily struck Appellant's brief with no justification whatsoever. This also obligated the State to provide Appellant, not the attorney, with notice of judgment because now Appellant was attorney of record and the existing attorney was not supposed to be representing Appellant in this matter because Appellant requested to have that attorney removed from the case and replaced by another who is competent. Now, the Court of Appeals had only three (3) choices in the equation, (1) to review Appellant's pro se claims providing liberal construction, or (2) provide the requisite effective assistance of an attorney, or (3) order existing counsel to cure the deficiencies in his brief and perfect Appellant's pro se claims and make them arguable appeal issues. This the Court of Appeals failed to do, thus, entitling Appellant to Federal review of all of his pro se claims not raised by the unwanted, fired, and removed appellate attorney because the State court failed did "not provide full and fair opportunity to litigate those claims," Wright, at 2486, because Appellant "may not default a constitutional claim through conduct that occurs as a result of the constitutional violations. Coleman v. Thompson,..." Morris, at 454, and Appellant was entitled, as a pro se litigant who was entitled to the aid of counsel, to procedural leniency, liberal construction, and not being held to a stringent definition of "cause." Strickland v. Marshall, at 598. Therefore, Appellant requests to appeal on these grounds because the

District Court was clearly wrong in its procedural ruling because Appellant supplied more than sufficient evidence of 'cause' to overcome the procedural defaults.

#### IV. ACTUAL INNOCENCE, MISCARRIAGE OF JUSTICE

"...a prototypical example of 'actual innocence' in a colloquial sense is the case where the State had convicted the wrong person of the crime." "...it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident that the Law made a mistake." *Sawyer v. Whitley*, 505 U.S. 333, 340-41 112 S.Ct. 2514 (1992).

"...a petitioner asserting both innocence and constitutional error 'need carry less of a burden' with respect to innocence than a petitioner like *Herrera* who claimed only innocence." *Schulp v. Delo*, 513 U.S. 298, 316, 115 S.Ct. 851, 861 (1985).

"...a habeas petitioner need not prove his innocence beyond all doubt in order to reach the safe haven of the miscarriage exception: it suffices if the petitioner can show a probability that a reasonable jury would not have convicted but for the constitutional violation. See *Murray*,..." *Burks v. Dubois*, 55 F.3d 718 (1st Cir. 1995).

"The Carrier standard requires the habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.' " *Schulp*, at 327/867.

"To satisfy the Carrier gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schulp*, at 327/867.

"...the Carrier standard requires a petitioner to show that it is more likely than not that 'no reasonable juror' would have convicted him." *Schulp*, at 329/868.

"Under a proper application of either *Sawyer* or *Carrier*, petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Schulp*, at 331/869.

Appellant objected to the Magistrate Judge's erroneous findings on this issue (See Petitioner's Objection Doc. 81, at 15) and further adds that Appellant provided more than the requisite evidence in support of this claim to overcome any existing procedural default. The evidence was 'newly discovered,' and could not have been discovered for the trial. The evidence is

highly credible because it was part of the Prosecutor's case file and police and State records kept as part of the police and State's regular course of business. The State failed to provide the evidence in discovery, and in conjunction with the State's admissions in the transcripts the evidence proves Appellant's innocence. Appellant provided fifteen (15) pages demonstrating actual innocence in Appellant's (TR) with supporting evidence from the State's authorities which possesses a high probative value. (TR Doc. 70, 26-40). Therefore, the District Courts holding that "...petitioner has not demonstrated that a fundamental miscarriage of justice will occur if his ineffective assistance of counsel claims are not addressed on the merits..." (Doc. 80, at 19) is contrary to the, facts, evidence, and contrary to law. Appellant carries a lesser burden of persuasion when supplementing the actual innocence claim with Constitutional violations which Appellant has done. The evidence met all of the requisite criteria because it was newly discovered and not presented at trial. It was unavailable for appeal and could not have been advanced then. It was the State's own admissions and its records and police records kept as part of the regular course of business which renders the evidence so highly probative that it exceeds the requisite standard necessary for Appellant to prove his innocence to a preponderance of the evidence and with "clear and convincing" evidence because it exceeds the proof beyond a reasonable doubt standard.

### THREE (3) MIRANDA WAIVERS

The first evidence not provided by the State and not presented to the jury for consideration was Richmond's three (3) Miranda waivers. Neither Appellant nor trial counsel knew Richmond signed these. The jury was not permitted to weigh and Appellant was unavoidably prevented from proving the "validity," "trustworthiness," and "reliability" of Richmond's multiple confessions to



police as being solely and independently responsible for the injury that caused the death of her son. (more fully set forth in TR Doc. 70, at 27-31 (¶21)-(¶23)). Since, the jury was not presented Richmond's three (3) Miranda waivers it was unable to render an accurate and reliable determination as to the "validity," "trustworthiness," and "reliability" of Richmond's repeated confessions as being solely and independently responsible for her child's injury and death. As the Miranda Court holds, validity of the Miranda waiver is determinative of the "validity," "trustworthiness," and "reliability" of a confession because whether or not a confessions possesses this probative force is determined by whether the individual has "knowingly," "intelligently," and "voluntarily," waived their Miranda rights and provided voluntary confessions in which Richmond did repeatedly throughout detective's (12) hour interrogation of Richmond. Additionally, Richmond's confessions were consistent with the nature of the injury and facts as the State knew from doctors. Detectives testified to this. What makes this evidence so critical is that Richmond suddenly and without any evidentiary justification diverted the entire blame to Appellant after this (12) hour interrogation where she maintained sole and independent responsibility. Detectives testifies that they knew her fabrications diverting blame to Appellant were lies because of the information they received from doctors and they testified to this. The issue is whether her fabrications suddenly diverting blame to Appellant are more trustworthy and reliable than her confessions after voluntarily waiving her Miranda rights on three (3) different occasions, and Appellant possessed the Constitutional right to be armed with this evidence and to present it to the jury for evaluation into their determination, the absence of which left a gigantic void in Appellant's case. The State neither proved with any evidence that Richmond's multi-layerd confessions were lies, nor did the State prove

with any evidence that Appellant was responsible for anything. An individual can be incredibly uncredible and still have provided "valid," "trustworthy," and "reliable" confessions; therefore, this is not an issue of Richmond's credibility, it is an issue of law whether or not her confessions are more trustworthy and reliable than her fabrications diverting blame to and implicating Appellant. The trial record mentions extremely candedly and vaguely that Richmond waived her Miranda rights, but that does not have the impact nor the probative force that three (3) signed Miranda waivers have when an individual voluntarily tape records confessions and even takes police to the crime scene waives Miranda rights again in writing then demonstrates how she caused the injury then after being taken back to the police station she waives her Miranda rights a third (3) time and maintains sole and independent responsibility. The trial record demonstrates that detectives testified that they knew Richmond's statements suddenly diverting blame to Appellant were lies because they knew from doctors how the injury occurred and it could not have occurred as Richmond implicated Appellant, but in the vacuum created by the absence of evidence proving beyond a reasonable doubt that Richmond's confessions as being solely and independently responsible were "valid," "trustworthy," and "reliable, the detective's admission that her fabrications implicating Appellant were lies lost its natural and reasonable force because the jury's determination failed to include that she "knowingly," "voluntarily," and "intelligently" gave "valid," "trustworthy," and "reliable" confessions as being solely and independently responsible. Therefore, Appellant's defense lost force because of the absence of evidence of innocence, and Richmond was given a five (5) year sentence and is now released, but Appellant was given an unconstitutional (31) year sentence without any chance of parole, judicial release, or earlier release for

Richmond's crimes. Appellant was the wrong individual to impose multi-layered convictions and sentences upon and this evidence proves beyond the requisite standards necessary. The United State Supreme Court holds, 'The fact that a confession is made without the grant of immunity and overwhelmingly against the individuals penal interests 'is a strong indicator of reliability.' See Williams v. United States, 512 U.S. 549, 599, 114 S.Ct. 2431, 2435 (1994)..." Carriger v. Stewart, 132 F.3d 436, 475 (9th Cir. 1997). Here, as in Carriger, the record viewed as a whole does not support the State's contention that Richmond's trial testimony diverting blame implicating Appellant was more reliable than her confessions. Carriger, at 475-76. Her sudden recantation of her confession after a (12) hour long interrogation where she continually and repeatedly confessed to being solely and independently responsible were simply recantations which the court's view with extreme suspicion. Carriger, at 483. Additionally, the Court in Smith v. Zant, 887 F.2d at 1435 held that "confessions carry 'extreme probative weight.' " The State presented no evidence whatsoever to discount Richmond's confessions to render her false trial testimony implicating Appellant more reliable than the probative force of her continued and repeated confessions as being solely and independently responsible. Regardless of Richmond's credibility, she provided "valid," "trustworthy," and "reliable" confessions that carry a high probative value which was the highest ranking evidence presented at that trial. As Appellant sets forth in his Traverse (TR Doc. 70, 28-31) Richmond called 911 and confessed then confessed to doctors, nurses, social service investigators, and a chaplain upon arrival at the hospital. Her confessions were identical which adds to their verity and reliability.

The State's failure to provide defense with this evidence is in violation of the Due Process Clause, thus, qualifies as "a constitutional violation"

that has "probably resulted in the conviction of one who is actually innocent." Carrier, 496/2650, and in violation of Due Process of Law because "due process does require the state to allow the accused to present a complete defense." California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984). Therefore, the State's failure to provide the defense with this evidence violated due process and has resulted in the conviction of one who is actually innocent.

This also proves ineffective assistance of trial counsel for failure to conduct a "reasonable investigation" and discover and present the evidence, thus, failing to protect Appellant's Constitutional rights by failing to present a complete defense which constitutes another Constitutional violation that caused the conviction of an innocent individual. The ineffective assistance of counsel also works as cause to overcome the procedural default. This, in conjunction with the record evidence that the State admitted that it possessed valid, trustworthy, and reliable evidence that Appellant was not there when the injury occurred, and that it possessed expert evidence that Richmond's fabrications suddenly diverting blame implicating Appellant were lies, and in conjunction with the fact that Richmond continually and repeatedly voluntarily gave confessions as being solely and independently responsible, the only logical, rational, and reasonable determination is that Appellant is innocent.

#### EVIDENCE OF ALIBI

Another piece of evidence that possesses a high probative value and the jury was not permitted to factor into their determination is that detectives had already established that Appellant was not even a suspect (T.P. 463) because he was not there when the injury occurred (T.P. 42) which was supported by "valid," "trustworthy," and "reliable evidence, Richmond's own

confessions voluntarily provided after repeatedly waiving her Miranda rights. Richmond did not just suddenly include Appellant into the crime, she diverted fully the blame, culpability, and responsibility for causing the injury and the death of her son. (facts fully set forth in TR Doc. 70, 28-32(1122)-(1124); See also Statement of Facts for all evidence referred to herein). The record demonstrates that Richmond was fully aware of the severity of her son's injury from the onset, and she was sole legal guardian, thus, solely responsible for the care and welfare of her child. The record demonstrates that Appellant was neither the father, nor in a position of control over Richmond or her son, and Appellant had only known Richmond for about a month which gave Appellant no legal authority over Richmond's family, and Richmond confessed to being solely responsible for the (12) hour delay in seeking medical treatment which caused the death of her son. Appellant cannot be blamed for Richmond's crimes. The State's failure to provide the jury with what it knew was an ironclad alibi, and charging, trying, and convicting an individual that it possessed overwhelming evidence of innocence that Appellant was not there at the time of the injury therefore he could not have caused the injury is in flagrant defiance to all Due Process of Law principles, thus, this requires reversal. Because, had the jury heard that the State possessed evidence of this probative force there would be no jury alive that could have found Appellant guilty. This is one Constitutional Due Process of Law violation that renders Appellant innocent under the Carrier standard. Second, trial and appellate counsel failed to touch even lightly on these facts to defend Appellant's Constitutional rights; therefore, Appellant was left without the adequate defense that he was Constitutionally entitled to at trial and on Appeal. The real big question is, how could the State of Ohio charge, try and convict an individual that it proved with the words of its own mouth supported by

"valid," "trustworthy," and highly "reliable" evidence proving beyond a reasonable doubt that Appellant was not even there. This was where the buck should have stopped. The second question is how could trial counsel and the State of Ohio go through an entire trial and not even mention these facts to the jury one time. Therefore, the numerous Constitutional violations justify full Federal Habeas Corpus review.

#### (12) HOUR DELAY IN SEEKING MEDICAL TREATMENT

More evidence that the jury was not permitted to factor into their determination was that Richmond was not charged for causing her son's injury, or for causing her son's death through her (12) hour delay in seeking medical treatment as the State's testimony on record makes clear. (T.P. 15, 24-25; 16, 1-0). Richmond's guilty was to endangering children for, as the State put it, "the pain and suffering endured" by Richmond's son due to "her" (12) hour delay in seeking medical treatment. Appellant received (31) years for this, but Richmond received five (5) years. The jury's verdict of Appellant's guilt was cut by the fact that it was not provided all of this evidence. The State pursued a complicity charge; therefore, the only thing the jury could have found was that Appellant might have been in complicity with Richmond on all of the charges because the jury was not provided what all Richmond was charged with and the record evidence does not demonstrate that Appellant had anything to do with causing the injury or delaying medical treatment for (12) hours. That was all on the mother (Richmond) who was solely and independently responsible for her son's care because she was sole legal guardian. Richmond confessed to being solely responsible for the delay when she told police that she "was an independent person," she "had a brain," and "she could make that decision on her own." Thus, demonstrating that she was in full control over every little thing that occurred and maintained that. It was in violation of

Appellant's Due Process right to charge, try, and convict him of something that he possessed absolutely no knowledge of and no control over. This is fully set forth in Habeas Corpus Petition.

**GRANT OF IMMUNITY FROM OTHER FIVE COUNTS**

More evidence that the defense was not provided and the jury was precluded from factoring into their determination was that Richmond was granted immunity from prosecution and the State failed to provide defense with the promises for use at trial for impeachment purposes which was the basis of Appellant's Fifth Ground For Relief advanced as a Brady claim. (Habeas Petition Doc. 53, at 36-44; see also TR Doc. 70, 32-33(¶26)). It is obvious from the after-record after Richmond made multi-layered confessions after signing multi-layered Miranda waivers for causing the injury and death of her son that she was not charged for that she was granted immunity. The record demonstrates that this was discovered after trial and included in Appellant's motion for new trial where the prosecutors admitted that they granted Richmond immunity. That was when Appellant should have received a new trial under Brady. The jury was not provided the fact that Richmond was only charged with a single count indictment whereas Appellant was given a six (6) count indictment for the same thing, and she received only a five (5) year sentence for payment for her promise of immunity or partial immunity which is the same thing, and Appellant was given (31) year sentence for exactly the same thing. Had the jury been presented with all of the facts about how heavily Richmond was paid by the State for providing incriminating testimony then it is indisputable that this would have severally effected their determination. The Brady Constitutional violation caused Appellant to be convicted of Richmond's crimes, and constitutes cause for the procedural default under Carrier. Appellant requests to appeal on these grounds.

**PROMISE OF LENIENCY**

More evidence that the jury was not provided to factor into their decision was the fact that the State promised Richmond that it would stand silent and not even pursue a prison term leaving Richmond with the impression that if she testified favorably for the State she would either not go to prison, or she would receive a minimal sentence. (See Habeas Petition Fifth Ground for Relief; TR Doc. 70, 33-34(127)). Richmond's sentencing hearing was strategically scheduled and rescheduled until after Appellant's trial which was about a year which constituted an extreme motivating factor and caused Richmond to fabricate her trial testimony to continue to divert blame and to attempt to obtain a favorable minimum sentence at her upcoming sentencing hearing. The State also admitted on the record after trial at a motion for new trial hearing that it made this promise (T.P. 767, 4-9) which should have been sufficient to cause a new trial. The Court found that the State did not disclose these promises (immunity and leniency) neither prior to or at trial. (T.P. 752, 24-25; 753). This promise was not discovered until after trial by Appellant's attorney. (T.P. 753). The evidence demonstrates that Richmond sought only to continue to divert blame and curry favor with the State to evade the six (6) count indictment that Appellant received and to mitigate her own sentence at her upcoming sentencing hearing. Had the jury been provided this evidence to factor into its determination this would have proven Appellant's innocence and the outcome of the trial would have been different in the absence of this constitutional violation.

**FALSELY ALLEGED APOLOGY NOTE**

More evidence that the jury was not provided to factor into its determination was the police search warrants and inventory lists demonstrating that Richmond's testimony concerning the origin, contents, especially the



meaning of the note was all a fabrication aimed at Richmond's continued efforts to keep blame from herself and to fully divert blame to Appellant. (See Habeas Petition Sixth Ground for Relief, at 50-52; TR, Doc. 70, 34-35(1128)). This was in violation of Appellant's Due Process rights established in *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S.Ct. 763, 766 (1972); *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935) (knowing presentation of false evidence combined with Brady suppression of evidence). This constitutes a constitutional violation that probably caused the conviction of one who is actually innocent. The note does not state anything connecting it to this injury. The only thing connecting it was Richmond's fabrications about it. The police inventory lists demonstrate where the alleged apology note came from and when it was obtained which was in no way connected to the fabrication that Richmond fed to the jury and the prosecutors were fully aware of where this note came from because they possessed the search warrants and inventory lists written by detectives. The police search warrants do not lie as to the origin of the note in the white envelope which establishes that this note was discovered in the kitchen trash by detectives during execution of their search warrants on January 3d, or 8th 1997. This evidence possesses probative force in its extreme because it was part of police records kept as part of their regular business routine. The Due Process Clause provides, "[e]vidence cannot have probative value unless a party connects it to the defendant in some meaningful way." *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475 (1991). The State failed to connect that note to the injury in any way because Richmond's testimony possesses absolutely no probative value whatsoever under the circumstances that exists in this case. Therefore, it violates Due Process of Law for the State to fail to connect the note to the injury "in some 'meaningful' way." In other words, it is

indisputable that detectives found the notes in the kitchen trash three (3) or eight (8) days after Appellant's arrest and the State knew this because they possessed the search warrants and it says so in the search warrants and inventory lists attached to them. Appellant was in the county jail for this charge and could not have written the letter (note) and placed it in the kitchen trash because he was never in the apartment at all after the injury and the State knew this. Third Due Process of Law violation is that this was Brady material and defense counsel testified on record that he did not receive this in discovery. (T.P. 402, lines 8-10). Fourteenth Amendment Due Process violation by the State and Sixth Amendment rights violation because Appellant was denied "meaningful" investigation and defense by trial counsel to uncover and connect the search warrants to the note to prove the notes were written prior to the injury then discarded in the trash. Counsel did not lie about not receiving this note in discovery. Defense counsel did not receive the search warrants either and they did not surface until years later after direct appeal was over. Nobody but the State knew that the search warrants contained exculpatory evidence demonstrating that the alleged apology note had nothing to do with Richmond's son's injury or death until defense uncovered the search warrants years later. The note was marked with the State's inventory number to identify it and the date the note was discovered in the kitchen trash. It is indisputable that the note had nothing to do with the injury. It is indisputable that the prosecutors knew it had nothing to do with the injury, or they should have properly identified the origin and verity before trial and provided defense with copies for investigation purposes which would have uncovered the search warrants before trial identifying that Richmond's testimony about the note was simply another fabrication calculated to continue to divert blame and curry favor with the State in an attempt to obtain a

minimal or no prison term at her upcoming sentencing hearing and to evade further indictments. Therefore, Appellant suffered prejudicial effect that he was unable to counter, challenge, and impeach possibly the most damaging fabrication at all during trial which also denied opportunity to develop an accurate record for appeal in violation of Due Process of Law.

## PART TWO OF FIFTH GROUND FOR RELIEF

### EVIDENCE OF CAUSE OF DEATH

In violation of Brady denying Appellant of "effective impeachment cross examination" and of a "powerful defense" at trial. *Gigilo v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972); *United States v. Bagley*, 473 U.S. 667, 677, 105 S.Ct. 3375, 3381 (1985). The State withheld the evidence that Richmond's (12) hour delay in seeking medical treatment is what caused the death of her son. (Habeas Petition Doc. 53, 39-44). At the end of the trial expert witness testimony demonstrated that her son had a (65) percent probability of living with the (70) percent burn, (T.P. 575) but that plummeted to ten (10) percent due to her (12) hour delay in seeking medical treatment. Richmond confessed to controlling when medical treatment was obtained for her son which the record demonstrates. Expert witness Doctor Warden testified that her son died of "shock lung" caused by the (12) hour delay and they could have controlled this and this is what he die of "in actuality." (T.P. 578; 583). This evidence was material because it was Richmond's delay not Appellant's because as Richmond told police during her confession "I am an independent person, I have a brain, and I make those decisions on my own" referring to when she obtained medical treatment (T.P. 424; 425; 427; 491; 549) therefore, Richmond controlled the outcome because she was her son's only legal guardian (Statement of Facts) and Appellant had only known her for about a month and did not possess any authority over Richmond or her family. Since, Richmond was taking care of her

son as she seen fit, Appellant cannot be held responsible for her actions which is what occurred. Therefore, Appellant cannot be held responsible for the death because that was brought on by Richmond's (12) hour delay. Appellant was denied of a very powerful defense throughout the trial because defense counsel did not know the significance of this delay until after all of the witnesses had testified and it was not adequate to recall all of the witnesses in an attempt reformulate the most powerful trial strategy that Appellant would have had. This evidence was material to who actually caused and was responsible for the death. Richmond diverted the entire blame over to Appellant and was only charged for the pain and suffering that her delay caused (T.P. 15-16) and only received a five (5) year sentence after providing full confessions and a guilty plea, whereas, Appellant received (31) years without parole or any chance of earlier release most of which stems from the result of this (12) hour delay that Appellant possessed no control over. The record demonstrates that Appellant was not even there most of the time. Richmond was alone with her son; therefore, it was her choice and authority of when to obtain treatment for her son, and Appellant is entitled to Habeas relief. Appellant was not the candidate for a life sentence. Nevertheless, the State failed to provide defense with any clue of the significance of the delay because before trial defense counsel filed a motion to dismiss and accused the State of withholding evidence that the delay did not cause the death (T.P. 86, 16-20; 87, 11-14) because that was the premise of Richmond's plea hearing (T.P. 10-16) she was not charged for the resulting death, and the prosecutors argued rigorously that it possessed no such evidence; therefore, the withheld evidence was that the delay did cause the death. The evidence was material because it was Richmond's delay and since the delay was the cause of death "in actuality" (T.P. 578, 22-23) as the expert witness testified; therefore,

Richmond is responsible for the death because she controlled when her son received medical treatment not Appellant. The State cannot deny that the delay in seeking medical treatment did not cause the death because the State relied upon this very factor and argument in closing argument that Appellant was responsible for the death because he delayed medical treatment for Richmond's son. The probability was high that Richmond's son would have lived had she not been so controlling and obtained immediate medical treatment. Appellant was denied of a full and fair defense, as well as, effective assistance of trial counsel which Appellant requests to appeal on.

#### SIXTH GROUND FOR RELIEF

The State, through police testimony, continually, repeatedly, and knowingly presented false and misleading testimony to the jury with the sole intent of obfuscating the trial and to vouch, bolster, and create false credibility for Richmond's testimony, thus, violating elementary principles of Due Process of Law as the United States Supreme Court holds:

" '...a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' United States v. Agurs,..." United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381 (1985).

"Where Governments case depended almost entirely on testimony of witness who was named as co-conspirator but was not indicted, and without it there could have been no indictment and no evidence to carry the case to the jury, such witness' credibility was important issue in the case..." Gigilo v. United States, 405 U.S. 150, 92 S.Ct. 763, 764 (1972).

"...deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' ... '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' ... A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury...' " Gigilo, at 153-54/766.

"Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." Gigilo, 153-54/766.

"...there is no suggestion that different 'arms' of the government are severable entities, particularly when they are closely connected. United States v. Deutsch, 475 F.2d 55, 57 (CA 5, 1973). Therefore, the city's police department represents the state no less than the prosecutor's office, and the taint on the trial is not less if police, rather than the state's attorney, are guilty of misrepresentations. Barbee v. Warden, 331 F.2d 842 (CA 4, 1964)." State v. DeFronzo, 59 Ohio Misc. 113, 394 N.E.2d 1027, 394 N.E.2d 1027, 1032 (1978).

"The dignity of the United States Government will not permit the conviction of any person on tainted testimony. ... The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them." Mesarosh v. United States, 352 U.S. 1, 14, 77 S.Ct. 1, 8 (1956).

Here, the police department repeatedly, "knowingly," and blatantly lied to the jury and the prosecutors, as well as, defense counsel failed to do or say anything about the numerous instances. The proof is in the record. First, the police repeatedly lied by repeating Richmond's fabrications and calling them the truth without any supporting evidence then advanced more false testimony to vouch for and create false credibility for Richmond's statements diverting blame implicating Appellant. Then a detective testified that they all knew Richmond's statements diverting blame to Appellant were all lies because of evidence obtained from doctors. It could not have happened that way. The state failed to support any of Richmond's fabrications with any evidence whatsoever and the detective's false testimony was solely to create false credibility for her unsupported accusations. The newly discovered evidence, set forth above, combined with the fabricated testimony demonstrates the State's intent to deprive Appellant of a "fundamentally fair trial" in violation of Due Process of Law. The police knowingly made statements they knew were false because based upon expert witness testimony, Doctor Warden, Richmond's confessions were consistent with the nature of the injury, "immersion," and consistent with her son's seizure disorder described as a "blank stare," but her fabrications implicating Appellant were non-corroborated. Therefore, the jury

could not have found her fabrications implicating Appellant to be "valid," "trustworthy," "reliable," nor truthful to have based its determination upon because those fabrications do not possess the probative value that rise to the requisite standard of proof beyond a reasonable doubt, and the police false testimony fabricating more testimony to create false credibility severally undermined the truth finding function of the trial violating Appellant's Due process rights established in *Mooney v. Holohan*, 294 U.S. 103, 112 S.Ct. 55 S.Ct. 340, 342 (1935). *Gigilo*, at 150/764. The police claimed to have conducted self-created experiments, and self-created presumptions of Richmond's innocence and Appellant's guilt that possessed absolutely no logical or reasonable evidentiary support and was, in fact, contrary to what the state knew was proven with credible expert witness evidence. Expert witness testimony and numerous voluntary confessions carry high probative evidentiary value reaching the proof beyond a reasonable doubt standard; therefore, the only reasonable and rational determination that can be drawn from the entire trial is that Richmond caused her sons injury during Appellant's absence from the residence, then failed to adequately inform Appellant of the true severity, then she delayed medical treatment while she hid her son in his room until Appellant left for work the next morning, then two hours later decided she could not hide the injury any longer and then called 911 for help. This is the only thing that can be deducted from the trial evidence, and since the only thing that the jury could have based its determination upon was false testimony which is in violation of Due Process of Law and since Appellant was denied a full and fair trial, as well as, full and fair hearings on appeal this conviction should be overturned, and Appellant requests to appeal on his Sixth Ground for Relief.

## SEVENTH GROUND FOR RELIEF

"PETITIONER'S ALLEGED ADMISSIONS"

The State violated Appellant's Fifth and Fourteenth Amendment rights when it presented at trial detective's testimony of alleged statements during police interrogation. Petitioner was denied a full and fair hearing and reliable determination of voluntariness pursuant to Jackson v. Deno, 378 U.S. 368, 84 S.Ct. 1774, 1781 (1964); therefore, Appellant was entitled to Habeas review. The alleged false admission was not admissible pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) because Appellant did not voluntarily provide [any] statements. The alleged admission was not admissible pursuant to Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000) because Appellant's "talk to my lawyer" statement to detectives possesses the exact same force that it possessed in Combs; and counsel was ineffective exactly the same as in Combs, and the jury was not provided all of the evidence from the pre-trial hearings that demonstrate that Appellant made no admission or any statements at all, thus, invoking his Fifth Amendment privilege unwaiveringly; therefore, Appellant was not provided a full and fair hearing or trial on the issue of voluntariness, and police were permitted without objection or any challenge to falsely present what they wanted. Appellant's refusal's to voluntarily make [any] statements to police is the decimal equivalent of Combs' "talk to my lawyer" statement and requires reversal. Counsel, as well as, the State failed to provide the jury with the indisputable evidence that Appellant refused to voluntarily give [any] statements at the time of arrest even though it was on record from the earlier hearings; therefore, Appellant was denied a "fundamentally fair trial" in violation of Due Process of Law. Here as in Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997), counsel failed to "actively advocate his client's cause" by failure to present to the jury critical



evidence that Appellant refused to give [any] statements in the absence of an attorney. Here as in Combs, at 286, counsels failure to object or challenge in any way the unconstitutional use of the false alleged admission constitutes ineffective assistance of counsel. Appellant did not take the stand, thus, did not "open the door" for use of the alleged false statement at trial for impeachment purposes; therefore, the State's presentation of the alleged admission is in violation of Due Process of Law. Here as in Broseclose v. Bell, 130 F.3d 1161 (6th Cir. 1997), counsel's failure to develop defense theory, and "to conduct any meaningful adversarial challenge as shown by his failure to cross-examine" on the critical issue of the alleged admission was also a denial of due process of law. And, the State's unlawful admission of the alleged statement was in violation of Fourteenth Amendment Due Process rights. Here as in Tucker v. Prelesnik, 181 F.3d 747 (6th Cir. 1999) counsel came "unprepared for trial" and "had not obtained critical evidence of which he was aware" from the pre-trial hearings that he knew proved that Appellant refused to voluntarily given [any] statements in the absence of an attorney. The jury was not provided any rebuttal evidence or challenges due to counsel's deficiencies. Tucker, at 757-58. Here as in Jackson v. Deno, 378 U.S. 368, 84 S.Ct. 1774 (1964) "the procedures employed in this case did not afford a reliable determination of voluntariness," and "did not adequately protect Appellant's rights." And, "without the confession (admission) the evidence is insufficient." Jackson, at 1783. Appellant's Due Process rights were violated because Appellant possesses the, "...constitutional right at some stage in the proceedings to object to the use of the confessions and to have a fair hearing and reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." Jackson, at 1781. Additionally, "...a reliable and true confession need not be rejected as

involuntary and that evidence corroborating the truth or falsity of the confession and the guilt or innocence of the accused is indeed pertinent to the determination of the coercion issue." Jackson, a t 1784. The State admitted that the alleged admission was not reliable because it was false. (T.P. 481; 504, lines 16-25; 505, lines 1-9). Therefore, the alleged admission was not reliable because it was so factually incorrect it is obvious that it had to have been coerced, but Appellant never made any such statement, nor did it reach the standard of proof beyond a reasonable doubt required for a jury to have relied upon it because of its inconsistency with true facts. And, it was unconstitutionally presented. Appellant requests to appeal on these grounds.

#### NINTH GROUND FOR RELIEF

##### FOURTH AMENDMENT CLAIM

"...claims under Mapp are not cognizable on habeas as long as the state court have provided full and fair opportunity to litigate them at trial or on direct review. See Stone v. Powell,..." Wright v. West, 505 U.S. 285, 293, 112 S.Ct. 2482, 2491 (1992).

Appellant was not provided a full and fair hearing on his Fourth Amendment rights claim which is closely intertwined with his Fifth Amendment right claim, neither before, during trial, nor on direct appeal due to the erroneous procedural rulings on appeal. First, Counsel moved for a hearing to litigate the Fourth Amendment right claim, (T.P. 93, lines 2-25) but no argument or evidence was ever presented nor was anything resolved, and Appellant possessed a very powerful Fourth Amendment rights claim. The Court was not considering the pertinent facts that render the alleged arrest unlawful and the alleged "admission" obtained unlawful due to ineffective assistance of counsel because counsel was not adequately presenting the pertinent facts. This cannot be construed as a "full" and "fair" opportunity; therefore, Appellant was denied

a "full" and "fair" hearing on his Fourth Amendment right claim which renders it reviewable in Habeas proceedings. Here, the record demonstrates (totality of the circumstances) that Richmond just spent the earlier (12) hours confession to being solely and independently responsible for causing her son's injury and for delaying medical treatment for (12) hours which caused the damage that caused the death of her son then suddenly after she learned that there were going to be legal ramifications, and without any basis or evidentiary justification, Richmond suddenly diverted full blame to Appellant and Detectives knew these statements to be lies. (T.P. 543; 544; 545). Richmond's fabrications diverting full blame to Appellant do not possess the validity, trustworthiness, nor reliability to be evidence necessary for police to establish probable cause for police to arrest Appellant in the absence of corroborating evidence or information in which police did not possess because they knew her statements implicating Appellant were lies. And, Illinois v. Gates, 462 U.S. 213, 230, 103 S.Ct. 2317, 2328 (1983); U.S. v. Williams, 10 F.3d 1070, 1074 (4th Cir. 1993). This requires Richmond's statements to be reasonably corroborated by other matters within the officer's knowledge, Jones v. United States, 362 U.S. 257, 269, 80 S.Ct. 725, 735 (1960), and police testified that they knew Richmond's statements implicating Appellant were lies because they knew from doctors how the injury occurred and it could not have happened that way, (T.P. 543; 544; 545) they knew Appellant was not there at the time the injury occurred, (T.P. 42) Richmond had continually and repeatedly confessed to being solely and independently responsible after waiver her Miranda rights on three (3) different occasions during detective's seven hour long interrogation, they knew Richmond's confessions were consistent with the nature of the injury "immersion" and her sons seizure disorder described as a blank stare, (T.P. 540; 487) and Richmond's statements

did not possess the veracity and reliability for police to act on them to arrest Appellant. Therefore, police never possessed any information to justify letting Richmond go and arresting Appellant. Appellant's alleged admission should "...have been excluded because it constituted "fruit of the poisonous tree." Williams, at 1074. Appellant requests to appeal on these grounds.

**TENTH GROUND FOR RELIEF**

**INSUFFICIENCY OF THE EVIDENCE**

Appellant request to appeal on the grounds that there was insufficient evidence to convict Appellant on five (5) out of six (6) counts of the indictment stemming from what the State concedes was a single act or "course of conduct." And, no rational trier of fact could have found any of the elements of the charges proven with any evidence. There simply was no evidence presented that the State did not disavow. As fully set forth in Habeas Corpus Petition. Appellant requests to appeal on these grounds.

**ELEVENTH GROUND FOR RELIEF**

**INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL**

Appellant requests to appeal on the grounds that counsel failed to provide adequate assistance which has been partly set forth above, and fully set forth in Habeas Corpus Petition.

**TWELFTH GROUND FOR RELIEF**

**TWO DRAMATICALLY OPPOSED POSITIONS**

At Richmond's plea bargain hearing where she confessed again to being solely responsible for the 12 hour delay that caused the death of her son, the State took the position that the 12 hour delay had absolutely nothing to do with the death because it was Richmond's delay not Appellant's. Defense counsel filed a motion to dismiss (T.P. 85) arguing that the State withheld evidence that the delay in seeking medical treatment did not cause the death.

The State argued rigorously that it possessed no such evidence. Therefore, this is not a proven fact. Then at trial the State presented expert witness testimony establishing that the 12 hour delay caused the death, "in actuality." (quoting expert witness Doctor Warden T.P. 578). The State avered in closing argument that Appellant was guilty of manslaughter for the delay in seeking medical treatment; thus, severally violating Appellant's Due Process rights because it could only have been Richmond's delay due to the fact that she is sole legal guardian, Appellant was not the father nor acting as father, nor did Appellant have any control, authority, power, or knowledge over the matter of when medical treatment was obtained. And, Appellant possessed no authority, control, or power to force Richmond to do anything with her family, and Appellant did not know of the severity of the injury; therefore, the State's multiple positions were severally prejudicial causing Appellant to be convicted of a charge that the circumstances of which Appellant possessed absolutely no control over. Appellant requests to appeal on these grounds.

#### **THIRTEENTH GROUND FOR RELIEF**

##### **IMPOSING MULTIPLE PUNISHMENTS FOR ONE OFFENSE**

The State violated Appellant's Fifth and Fourteenth Amendment rights by imposing multi-layered convictions and punishments for what could only have been construed as one offense, one act, one course of conduct, one alleged behavior. The State could not have prevailed on the multi-count indictment in the first instance because it possessed no evidence of all of the elements of any of the charges and the guilty verdict on five counts and multi-layered sentences totaling (31) years is far beyond what the State was authorized to impose which is in violation of Appellant's Fifth and Fourteenth Amendment rights. Therefore, Appellant requests to appeal on these grounds.

FOURTEENTH AND FIFTEENTH GROUNDS FOR RELIEF

Appellant withdrew these two grounds in earlier proceedings stated above.

For the foregoing reasons, Appellant respectfully requests to appeal on the foregoing grounds, as well as, the grounds set forth in Appellant's traverse/response, and objection to Magistrate's Report.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard J. Klein III". The signature is stylized with large, flowing loops.

Richard J. Klein III 350-022

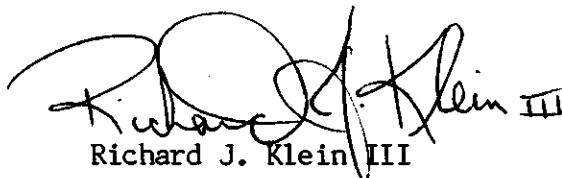
Petitioner/Appellant, pro se

R.C.I. P.O. Box 7010

Chillicothe, Ohio 45601

CERTIFICATE OF SERVICE

Appellant certifies that a true copy of the foregoing has been served upon counsel for respondent Assistant Ohio Attorney General Diane Mallory at 150 East Gay Street Columbus Ohio by regular U.S. mail on this \_\_\_\_ day of July, 2005.

A handwritten signature in black ink, appearing to read "Richard J. Klein III". The signature is stylized with large, flowing loops.

Richard J. Klein III

Petitioner/Appellant, pro se